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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/561,753	02/01/2006	Colin Brown	102790-203 (30093 US)	1630
27389 7590 07/25/2007 NORRIS, MCLAUGHLIN & MARCUS 875 THIRD AVE 18TH FLOOR NEW YORK, NY 10022			EXAMINER CONLEY, SEAN EVERETT	
			ART UNIT 1744	PAPER NUMBER
			MAIL DATE 07/25/2007	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/561,753	<b>Applicant(s)</b> BROWN ET AL.	
	<b>Examiner</b> Sean E. Conley	<b>Art Unit</b> 1744	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 12/21/05, 2/1/06.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-12 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-12 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 21 December 2005 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date <u>12/21/2005</u> . | 6) <input type="checkbox"/> Other: _____  |

## DETAILED ACTION

### ***Claim Rejections - 35 USC § 112***

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 4 and 9 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Specifically, claim 4 recites the limitation "the substantially horizontal surface" and claim 9 recites the limitation "substantially horizontal surface". There is insufficient antecedent basis for these limitations in the claims.

### ***Claim Rejections - 35 USC § 102***

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. Claims 1-5 and 7-12 are rejected under 35 U.S.C. 102(b) as being anticipated by Pons Pons (U.S. Patent No. 4,425,302).

Regarding claim 1, Pons Pons discloses an apparatus capable of being adapted to transmit an active substance in the vapor phase to an atmosphere, comprising an

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active substance incorporated in a sublimable carrier substance (bar (2)) and a heating element (heating resistance (11)) that has a subliming effect on only part of the total sublimable carrier substance. Pons Pons further discloses that the carrier substance (bar (2)) and heating element (heating resistance (11)) are arranged such that the sublimable carrier substance subliming at that part of the sublimable carrier substance affected by the heating element is replaced by further sublimable carrier substance (see figure 1; see col. 1, line 63 to col. 2, line 66). When the apparatus is plugged into the electrical outlet in a vertical wall the heating element is arranged in a horizontal direction (see figure 1).

Regarding claims 2, 8 and 9, Pons Pons discloses an apparatus wherein the heating element (heating resistance (11)) applies heat to the carrier substance by physical contact with the carrier substance (see col. 1, lines 50-68; see col. 2, lines 38-50). When plugged into a wall outlet the carrier substance (bar (2)) rests on the surface of the horizontal heating element (heating resistance (11)) and therefore the heat is supplied to the bar (2) by physical contact.

Regarding claims 3, 11 and 12, Pons Pons discloses an apparatus wherein the carrier substance (bar (2)) rests on a substantially horizontal surface which is the heating element (heating resistance (11)) (see figure 1). This arrangement occurs when the apparatus is plugged into an electrical outlet on a vertical wall with the heating element arranged below the carrier substance.

Regarding claim 4, Pons Pons discloses an apparatus wherein the carrier substance (bar (2)) is capable of resting on a substantially horizontal surface (heating

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resistance (11)) (see figure 1). This arrangement occurs when the apparatus is plugged into an electrical outlet on a vertical wall with the heating element arranged below the carrier substance.

Regarding claims 5, 10 and 12, Pons Pons discloses that the carrier substance (bar (2)) is part of a replaceable refill (see col. 1, lines 58-63; see col. 2, lines 61-67).

Regarding claim 7, Pons Pons discloses a method of transmitting an active substance (fragrance or insecticide) in the vapor phase into an atmosphere by incorporating the active substance into a sublimable carrier substance ((siblimable bar (2)) and heating the carrier substance by means of a heating element (heating resistance (11)) with which it has contact (see col. 1, line 63 to col. 2, line 66). The carrier substance (bar (2)) being arranged with respect to the heating element (11) such that carrier substance that sublimates at the contact between heating element and carrier substance is replaced by further carrier substance. When the apparatus is plugged into a conventional electrical outlet in a vertical wall the heating element is arranged in a substantially horizontal direction. The heating element arranged below the carrier substance enables the sublimable carrier substance (bar (2)) to sublime at the contact between the carrier substance and the heating element and the carrier substance is replaced by further carrier substance (see figures 1-2).

5. Claims 1, 3, 5 and 8 are rejected under 35 U.S.C. 102(b) as being anticipated by Patel et al. (U.S. Patent No. 5,647,052).

Regarding claim 1, Patel et al. disclose an apparatus adapted to transmit an active substance in the vapor phase to an atmosphere, comprising an active substance incorporated in a sublimable carrier substance (48) and a heating element (bulb (44)) that has a subliming effect on only part of the total sublimable carrier substance. The carrier substance (48) and heating element (bulb (44)) are capable of being arranged such that the sublimable carrier substance subliming at that part of the sublimable carrier substance affected by the heating element is replaced by further sublimable carrier substance (see figures 4-5; see col. 4, line 27 to col. 6, line 35).

Regarding claims 3 and 8, Patel et al. disclose that the carrier substance (48) rests on a substantially horizontal surface (50) which is heated by the heating element (bulb (44)) (see figure 5).

Regarding claim 5, the carrier substance (48) forms part of a replaceable refill that includes tray (47) (see figures 4-5; see col. 5, lines 20-26).

### ***Claim Rejections - 35 USC § 103***

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

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1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

7. Claim 6 is rejected under 35 U.S.C. 103(a) as being unpatentable over Patel et al. as applied to claim 1 above, and further in view of Spector (U.S. Patent No. 4,574,181).

Patel et al. disclose that the carrier substance (48) is contained within a tray (47) that is mounted within a support body (41) wherein the tray is completely sealed except for a vent opening at one end to dispense the volatile substance to the atmosphere. The sealing of the bottom end of the tray (47) is accomplished by a surface that is substantially horizontal and is in intimate, heat-conducting contact with the electrical heating element (bulb (44)). The support body (41) comprises suitable electrical wiring and connections (45) for the supply of heating electricity to the bulb (44) (see figures 4-

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5; see col. 4, line 27 to col. 6, line 35). However, Patel et al. fail to disclose that tray (47) is tubular in shape or an opening at the lower end of the tray (47).

Spector discloses a tubular shaped apparatus for dispensing an aroma into the atmosphere. The apparatus comprises a duct (23) that receives a tubular fragrance cartridge (24) containing a tubular shaped impregnated porous material. The cartridge (24) is housed near heater (16) so that the heat will release the fragrance into the atmosphere (see col. 4, lines 30-40; see figures 4-5; see col. 1, lines 5-13).

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to change the shape of the tray (47) or the shape of the entire apparatus to any suitable or desired shape including tubular as taught by aromatic dispenser of Spector since it has been held that a change in shape is a matter of design choice which a person of ordinary skill in the art would have found obvious absent persuasive evidence that the particular shape of the claimed apparatus was significant.

Furthermore, it would have been obvious to modify the location of the opening in the tray (47) and the outlet vent opening in the apparatus such that the openings correspond with each other and permit release of the active substance from the apparatus in a desired direction. It has been held that the modification of the location of parts such as the location of the openings in the tray and the dispensing apparatus is an obvious matter of design choice (see MPEP 2144.04).



**Conclusion**

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Sean E. Conley whose telephone number is 571-272-8414. The examiner can normally be reached on M-F 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Gladys Corcoran can be reached on 571-272-1214. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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*XEC*

July 17, 2007

  
GLADYS JP CORCORAN  
SUPERVISORY PATENT EXAMINER